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IN THE

SUPREME COURT OF THE UNITED STATES

HARRY C. DEVORE,
Appellant,

vs. :: No. 740

WEST VIRGINIA BOARD OF DENTAL EXAMINERS, and EDWARD J. JOSEPH, J. J. HERLIHY, WILLIAM I. BAKER, A. BROOKS DRAKE and LAWRENCE FANTI, Members of West Virginia Board of Dental Examiners,
Appellees.

JURISDICTIONAL STATEMENT AND APPENDIX

WILLIAM C. BEATTY
J. J. N. QUINLAN
H. G. WILLIAMSON
Counsel for Appellant

William C. Beatty
900 1st Huntington National Bank Bldg
Huntington, W. Va. 25701

J. J. N. Quinlan and
H. G. Williamson
909 Fifth Avenue
Huntington, W. Va. 25701

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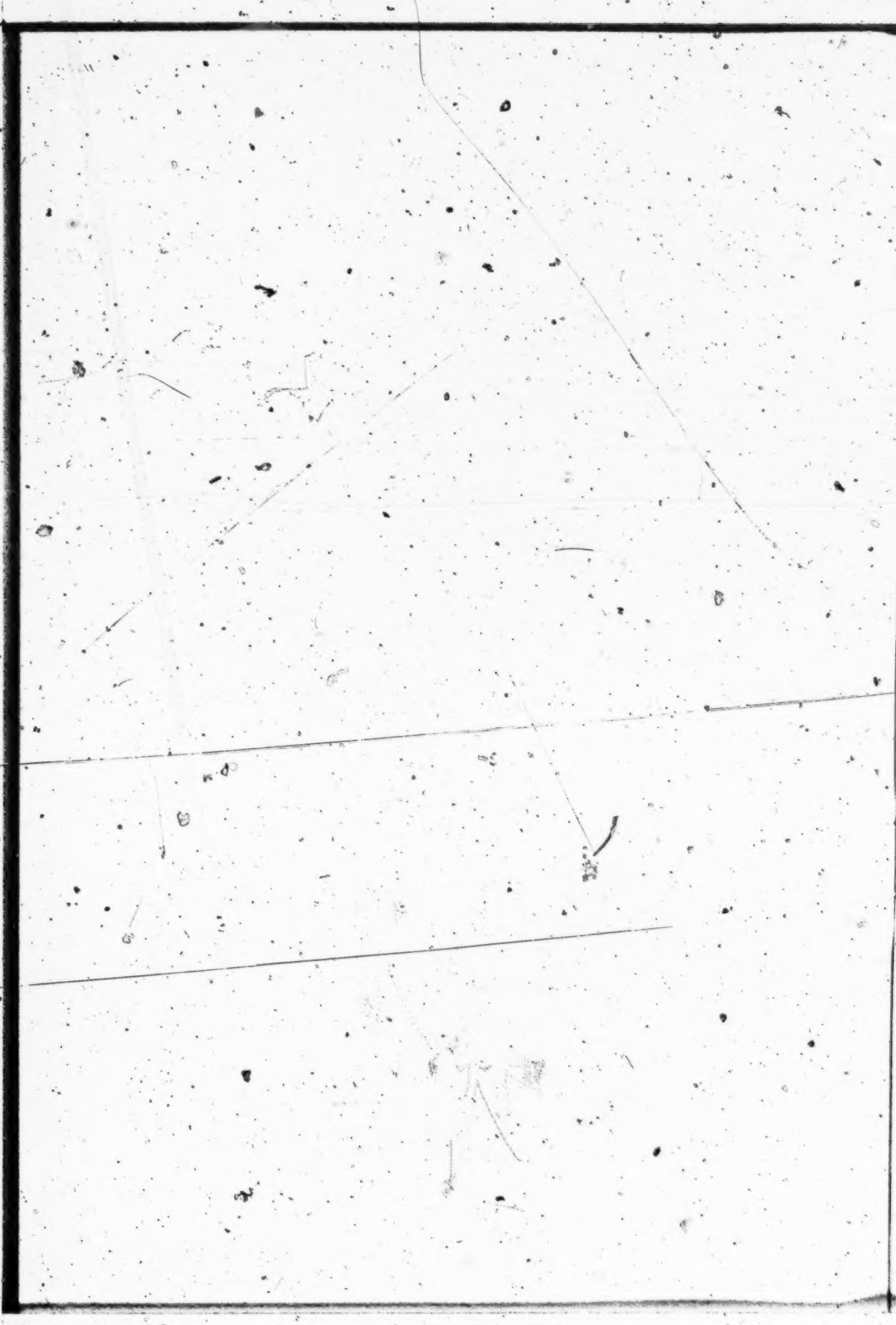

IN THE

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HARRY C. DEVORE,
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vs. :: No. 740

WEST VIRGINIA BOARD OF DENTAL EXAMINERS, and EDWARD J. JOSEPH, J. J. HERLIHY, WILLIAM I. BAKER, A. BROOKS DRAKE and LAWRENCE FANTI, Members of West Virginia Board of Dental Examiners,
Appellees.

JURISDICTIONAL STATEMENT

To the Honorables, the Judges of the United States Supreme Court:

I.

There are no official or unofficial reports of any opinion or opinions of any court below.

II.

The jurisdiction of this Honorable Court is invoked upon the following grounds:

(a) This proceeding was effectuated on August 4, 1958 when the West Virginia Board of Dental Examiners and the then constituent members of said Board (hereinafter referred to as "Dental Board" and "Board Members") filed their amended and supplemental bill of complaint in the Circuit Court of Cabell County, West Virginia, which after allegation of jurisdictional facts, the powers and duties of the Dental Board, and charging Harry C. Devore, appellant herein (hereinafter referred to as "Devore") with practicing dentistry without a license in contravention of Chapter 30, Article 4 of the Code of West Virginia, prayed for a temporary and permanent injunction enjoining, restraining and inhibiting Devore "from doing any acts constituting the practice of dentistry or of dental hygiene within the State of West Virginia without prior licensing by the West Virginia Board of Dental Examiners x x x". After hearing upon a companion case which the parties, by counsel, agreed would control the present case, the Circuit Court of Cabell County, West Virginia on October 6, 1958 entered an order perpetually enjoining Devore "from doing any act or acts, directly or indirectly, within the State of West Virginia constituting the practice of dentistry or the practice of dental hygiene as defined by statute without first having been licensed thereto by the West Virginia Board of Dental Examiners or a successor body".

On August 4, 1966 the Dental Board and successor Board Members filed in the same Circuit Court a petition alleging that Devore had refused entry and inspection of his premises by a member of the Dental Board under the provisions of Chapter 30, Article 4, Section 4a of the West Virginia Code, which was amended by Chapter 108 of the Acts of the West Virginia Legislature, 1961 Regular Session, to include the

language hereinafter underscored. The entire section reads as follows:

Powers and Duties.—The West Virginia Board of Dental Examiners shall examine all qualified applicants for license to practice dentistry or dental hygiene, and it shall license all such applicants who are qualified under applicable statutes and who pass the examinations that may be required by statute or by any legally adopted rule or regulation.

The said Board shall have the power to make such examination of all applicants appearing before it for any type of license as may be necessary to determine that the applicant is qualified. The said Board shall also have the power to revoke or suspend any license issued by it, for cause, after having given the person whose license is sought to be revoked or suspended, an opportunity to be heard in the manner provided by section eight, article one, chapter thirty of this Code. It shall have the power to reinstate any license revoked or suspended by it.

The said Board is authorized and empowered to hold and conduct hearings and investigations on the issuance, suspension, revocation, or reinstatement of licenses and on charges of unauthorized practice of dentistry or dental hygiene.

The Board, acting by and through its members, employees, and agents, is further authorized and empowered, at any time during customary office hours, to enter into the office or place of business of any dental laboratory, licensed dentist or other dental practitioner of this state, and to obtain access to, make inspection of, and request information regard-

ing any work authorization which such dental laboratory, licensed dentist, or other dental practitioner is required under the provisions of section two-a of this article, to retain therein, and is further authorized and empowered to inspect any items of dental technological work then in the course of performance by such dental laboratory or other person employed by it, and to inspect any dental prosthesis then in the place of business of, or upon the premises occupied by, such dental laboratory for making, production, reproduction, construction, repair, alteration, or restoration, and to request any information which it, its members, employees, or agents deem to be pertinent relating to any such dental technological work and of any such dental prosthesis. For the purpose of this paragraph the definition of terms contained in subsection A of section two-a of this article is made expressly applicable.

At that time and previous to the aforesaid legislative amendment Chapter 30. Article 4, Section 18, in *pari materia*, contained the following language:

> Any person who shall practice or offer to practice dentistry or dental hygiene in this state without first having complied with the provisions of this article, or who shall violate any of its provisions for which no specific penalty has been provided, shall be guilty of a misdemeanor, and upon conviction thereof of a first offense against this article, shall be fined not less than three hundred dollars nor more than one thousand dollars, or confined in jail not less than three months nor more than six months, or both fined and imprisoned at the discretion of the court.
>
> A person convicted of a second subsequent offense

against this article shall be guilty of a misdemeanor and shall be fined not less than one thousand dollars nor more than twenty-five hundred dollars, or confined in jail for not less than six months nor more than twelve months, or both fined and imprisoned, at the discretion of the court.

Each act of dentistry or dental hygiene shall be deemed a separate offense and shall constitute a practice of dentistry or dental hygiene within the meaning of this section, and each day that a person may hold himself out as practicing in his own name or any name shall be deemed a separate offense.

Notwithstanding the existence of any other remedy, the Board may, in the manner provided by law, maintain an action for an injunction against any person, partnership, or association to restrain or prevent the practice of dentistry and/or dental hygiene when such person, partnership or association repeatedly refuses to obtain registration or license therefor and constitutes the practice of dentistry and/or dental hygiene without first obtaining registration or license therefor in the manner hereinbefore provided.

The petition further alleged certain matters upon which no evidence was adduced or sought to be adduced, and certain other evidence was offered by way of oral testimony which was stricken on motion of counsel for Devore. Nevertheless, and in spite of the fact that there was not a scintilla of evidence introduced to demonstrate even *prima facie* that the injunction awarded eight years previously had even been violated. the trial court permitted an amendment to the 1958 order permitting inspection of appellant's premises in the language of the statute above quoted.

Thereafter Devore, by counsel, filed his petition for an appeal and supersedeas in the Supreme Court of Appeals of West Virginia, the highest judicial tribunal in said State upon the ground that said order of the trial court applied the statute above quoted in an unconstitutional manner whereby the appellant is subject to "unreasonable search or seizure" in contravention of the Fourth Amendment to the Constitution of the United States.

(b) On the 5th day of June, 1967, the Supreme Court of Appeals of West Virginia entered an order refusing to allow the appeal and supersedeas prayed for by Devore.

(c) This appeal is taken pursuant to 28 U.S.C. 1257(2).

(d) The following cases are believed to sustain the jurisdiction of the Court:

Camara v. *Municipal Court of San Francisco*, ... U. S. ..... 18 L ed 2d 930, 87 S. Ct.....;

See v. *City of Seattle*, ...U. S....., 18 L ed 2d 943, 87 S. Ct.....;

Wolf v. *Colorado*, 338 U. S. 25, 93 L ed 1782, 69 S. Ct. 1359;

Ker v. *California*, 374 U. S. 23, 10 L ed 2d 726, 83 S. Ct. 1623;

Go-Bart Importing Co. v. *United States*, 282 U. S. 344, 75 L ed 374, 51 S. Ct. 153;

Amos v. *United States*, 255 U. S. 313, 65 L ed 654, 41 S. Ct. 266;

Silverthrowe Lumber Co. v. *United States*, 251 U. S. 385, 64 L ed 319, 40 S. Ct. 182, 24 ALR 1426;

Oklahoma Press Pub. Co. v. *Walling*, 327 U. S. 186, 90 L ed 614, 66 S. Ct. 494, 166 ALR 531.

The questions presented by this appeal are:

(i) Is the inspection statute, West Virginia Code, Chapter 30, Article 4, Section 4a to be found in Volume 1 of the 1961 West Virginia Code at Page 1594, quoted at length above, authorizing entry by a state administrative official upon appellant's premises appurtenant to his home without first obtaining a warrant therefor, where a statute in *pari materia*, West Virginia Code, Chapter 30, Article 4, Section 18, to be found in Volume 1 of the 1961 West Virginia Code at page 1597, also quoted in full above, repugnant to and violative of the Fourth Amendment to the Constitution of the United States?

(ii) Is the decision of this case controlled by *Roland Camara* v. *The Municipal Court of the City and County of San Francisco*, ... U. S. .....19 L ed 2d 930, 87 S. Ct..... and *Norman See* v. *City of Seattle*, ...U. S..... 18 L ed 2d 943, 87 S Ct....., both decided by this Honorable Court on June 5, 1967?

III.

STATEMENT OF THE CASE

At the time of the filing of the original bill of complaint by the Dental Board and Board Members the appellant Devore had a laboratory in the City of Huntington, West Virginia where he conducted ceramic fabrication as well as experimentation. After the entry of the 1958 decree by the Circuit Court of Cabell County, West Virginia referred to above Devore closed the laboratory in down town Huntington.

On his premises, a short distance from the corporate limits of the Village of Barboursville, also in Cabell County, West Virginia, where he has resided for many years, he built an addition or annex to his dwelling house within the grounds enclosed for residential purposes. At the time of the filing of the original proceeding in 1958 there was no statutory authorization for inspection of premises, as was contained in Chapter 30, Article 4, Section 4a of the West Virginia Code, which statute was enacted by the 1961 Session of the West Virginia Legislature. On the ..... day of July, 1966 one Doctor Robert M. Wild, a practicing dentist of Huntington, purportedly under authorization of the Dental Board, came to the home of Devore and demanded of him that Wild be permitted to examine and inspect the laboratory located in said home by virtue of the statute above cited and quoted. Devore demanded the production of a warrant and upon failure of Wild to produce one refused admittance to the interior of the house to Wild. Another attempt was made by a person, or persons, representing themselves to be agents of the Dental Board, to gain admission to the home of Devore by virtue of this self same statute, without the production of a warrant. Again admission and inspection were refused. Whereupon the Dental Board through the offices of the Attorney General of the State of West Virginia, instituted this proceeding by filing a petition in the Circuit Court of Cabell County.

At the hearing on the petition, which was in the nature of a hearing upon contempt, the Dental Board attempted to prove a violation of the 1958 injunction decree by introducing as a witness one B. F. Skeens, who testified that he had been fitted for artificial dentures by some person in the City of Kenova, Wayne County, West Virginia, whose name he did not know and who apparently did not identify himself to Mr. Skeens, and further could not identify the appellant

Devore as that person, although Devore was present at the counsel table in the courtroom in plain view of the witness. Whereupon counsel for Devore moved to dismiss the petition and the proceedings, which the trial court declined to do and allowed the Dental Board, through the office of the West Virginia Attorney General, to amend the eight year old order in the language of Chapter 30, Article 4, Section 4a of the 1961 West Virginia Code above cited and quoted, so as a practical matter to allow inspection and examination of apppellant's premises without procuring and exhibiting a warrant so to do, as provided by law.

The Constitutional question involved was raised in the trial court by the motion of counsel for the apppellant to dismiss an objection to the amendment of the 1958 order by the trial court of its own motion to the hearing on the petition filed by the Dental Board and the Board Members. Thereafter the court overruled the motion and objection and allowed the amendment of the order complained of. See Transcript of proceedings had and testimony taken before Honorable John W. Hereford, Judge, on Friday, the 16th day of September, 1966, at Pages 50. et seq. The appeal from the order of the Circuit Court of Cabell County, West Virginia to the Supreme Court of Appeals of West Virginia was based entirely upon the grounds that the statute and the order incorporating the statute above cited and quoted was repugnant and in violation of the Fourth Amendment to the Consitution of the United States, as well as a similar constitutional provision contsined in the West Virginia Constitution adopted in 1872, which will more fully appear from the petition of appellant to the court of last resort of West Virginia, filed with the record herein. The Supreme Court of Appeals of West Virginia refused to review the matter and grant an appeal to Devore implicity on the ground that said inspection statute above cited and quoted was and is con-

stitutional, both with respect to the Federal and the State Constitutions.

IV.

FEDERAL QUESTIONS

It is felt that the federal questions presented are substantial upon the following grounds:

(a) The statute drawn into question, namely, Chapter 30, Article 4a, of the 1961 West Virginia Code, above cited and quoted, is an enactment of the highest legislative body of the state, presumably under the police power of the state. This statute, it is earnestly submitted on behalf of the appellant, is repugnant to the Fourth Amendment of the Constitution of the United States, and such question can only be decided by this Honorable Court.

See *Camara* vs. *The Municipal Court of San Francisco*, ...U. S.....18 L ed 2d 930, 87 S. Ct.....; *See* vs. *The City of Seattle*, ...U. S.....18 L ed 2d 943, 87 S. Ct.....; *Ker* vs. *California*, 374 U. S. 23, 10 L ed 2d 726, 83 S. Ct. 1623. and cases cited supra.

(b) The rulings of both the Circuit Court of Cabell County, West Virginia and the West Virginia Supreme Court of Appeals, the court of last resort in the state, by refusing to review and reverse the Circuit Court by its effect sustained the validity of the statute as against the Fourth Amendment to the United States Constitution. While the West Virginia Supreme Court of Appeals did not deliver a written opinion on the merits herein, a copy of the order of that court is appended hereto to demonstrate the finality of its ruling in view of the fact that no reapplication or rehearing of the

matter can be had after the expiration of eight (8) months from the date of the ruling of the Circuit Court of Cabell County, under West Virginia law. See Chapter 58, Article 5. Section 4 of the 1961 Code of West Virginia, which reads as follows:

> "No petition shall be presented for an appeal from, or writ of error or supersedeas to, any judgment decree or order, whether the state be a party thereto or not, which shall have been rendered or made more than eight months before such petition is presented."

This appellant. therefore. is precluded from any further relief from the order of the Circuit Court of Cabell County and in effect affirmed by the Supreme Court of Appeals of West Virginia. save by an appeal granted by this Honorable Court.

Respectfully submitted,

WILLIAM C. BEATTY
J. J. N. QUINLAN
H. G. WILLIAMSON

William C. Beatty
900 1st Huntington National Bank Bldg.
Huntington, W. Va. 25701

J. N. Quinlan and
H. G. Williamson
909 Fifth Avenue
Huntington, W. Va. 25701

APPENDIX

NOTE OF ARGUMENT AND MEMORANDUM OF AUTHORITIES SUBMITTED BY COUNSEL FOR APPELLANT ON APPLICATION FOR APPEAL AND SUPERSEDEAS BEFORE THE SUPREME COURT OF APPEALS OF WEST VIRGINIA.

This Order Received This the 9th day of June, 1967.
R. E. LEE TAYLOR, Clerk.

State of West Virginia:

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 5th day of June, 1967, the following order was made and entered, to-wit:

West Virginia Board of Dental Examiners, et al.,
vs.
Harry C. Devore

On a former day, to-wit, May 10, 1967, came the petitioner, Harry C. Devore, by J. J. N. Quinlan and H. G. Williamson, his attorneys, and presented to the Court his petition praying for an appeal from and supersedeas to a judgment of the Circuit Court of Cabell County rendered in this action on the 23rd day of September, 1966, with the record therein accompanying the petition, and note of argument in support thereof, which being seen and inspected by the Court the appeal and supersedeas prayed for is refused.
Judge Browning absent.
A True Copy

Attest: KENNETH E. HINES.
Clerk Supreme Court of Appeals

Entered, Circuit Court Civil Order Book No. 10, page 522, this 9th day of June, 1967.

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

WEST VIRGINIA BOARD OF DENTAL EXAMINERS, AND EDWARD J. JOSEPH, J. J. HERLIHY, WILLIAM I. BAKER, A. BROOKS DRAKE, AND LAWRENCE FANTI, Members of the West Virginia Board of Dental Examiners, *Plaintiffs*,

vs. :: In Chancery No. 740

HARRY C. DEVORE, *Defendant*.

NOTE OF ARGUMENT AND MEMORANDUM OF AUTHORITIES

To the Honorables, the Judges of the Supreme Court of Appeals:

Your petitioner, Harry C. Devore, would respectfully represent unto this Honorable Court that he is aggrieved by a final order made and entered on the 23rd day of September, 1966, by the Circuit Court of Cabell County, West Virginia.

Such portion of the original record as will adequately present the errors complained of, properly certified, is herewith presented and therefrom it will appear that the case is as follows:

ACTION AND PROCEEDINGS

An August 4, 1958, the plaintiffs, West Virginia Board of Dental Examiners and the predecessor members of said

board filed their amended and supplemental bill of complaint in the Circuit Court of Cabell County, West Virginia, after a previous bill of complaint had been held insufficient on demurrer by said Court, wherein, after recitation of jurisdictional facts and powers and duties of the plaintiffs, together with allegations of purported misconduct of the defendant under certain acts of the West Virginia Legislature therein cited, plaintiffs prayed for a temporary and permanent injunction enjoining, restraining and inhibiting your petitioner "from doing any acts constituting the practice of dentistry or of dental hygiene within the State of West Virginia without prior licensing by the West Virginia Board of Dental Examiners x x x". After hearing upon a companion case, which the parties, by counsel, agreed would control the present case the Circuit Court of Cabell County on the 6th day of October, 1958, caused to be entered an order perpetually enjoining your petitioner "from doing any act or acts, directly or indirectly, within the State of West Virginia constituting the practice of dentistry or the practice of dental hygiene as defined by statute without having first been licensed thereto by the West Virginia Board of Dental Examiners or a successor body".

On the 4th day of August, 1966, the successor board and its constituent members caused to be filed in the Circuit Court of Cabell County, West Virginia, their petition alleging that the defendant refused entry and inspection of defendant's premises by a member of the dental board under Code, 30-4-4a which was amended by the Legislature by Chapter 108 of its Acts which added the following language:

> "The board, acting by and through its members, employees, and agents, is further authorized and empowered, at any time during customary office

hours, to enter into the office or place of business of any dental laboratory, licensed dentist or other dental practitioner of this State, and to obtain access to, make inspection of, and request information regarding any work authorization which such dental laboratory, licensed dentist, or other dental practitioner is required under the provisions of section two-a of this article, to retain therein, and is further authorized and empowered to inspect any items of dental technological work then in the course of performance of such dental laboratory or person employed by it, and to inspect any dental prosthesis then in the place of business of, or upon the premises occupied by, such dental laboratory for making, production, reproduction, construction, repair, alteration, or restoration, and to request any information which it, its members, employees, or agents deem to be pertinent relating to any such dental technological work and any such dental prosthesis. For the purpose of this paragraph the definition of terms contained in subsection A of section two-a of this article is made expressly applicable."

The petition further alleged certain matters upon which no evidence was adduced or sought to be adduced, but on the contrary the Court permitted certain other evidence to be introduced, at the conclusion of which the Court sustained defendant's counsel's motion to strike. However, in spite of the fact that no evidence whatsoever was introduced to show a violation of the injunction, the Court permitted an amendment to the 1958 order permitting inspection of your petitioner's premises in the language of the statute above quoted. It is of this arbitrary action of the lower court that your petitioner complains.

POINTS AND AUTHORITIES

1. The action of the Circuit Court violates the mandate of the Constitution of the United States and the State of West Virginia in permitting an unreasonable search.

U. S. Constitution, Amendment 4.

W. Va. Constitution, Article 3, Section 6.

District of Columbia v. *Little*,
178 F. 2d 13, 13 ALR 2d 954;

Boyd v. *U. S.*,
116 U. S. 616, 6 S. Ct. 524, 29 L. Ed. 746;

State v. *Andrews*,
91 W. Va. 720, 114 S. E. 257;

State v. *Massie*,
95 W. Va. 233, 120 S. E. 514.

2. The action of the Circuit Court violates the provisions of the Constitution of West Virginia as depriving the defendant of his rights without due process of law.

W. Va. Constitution, Article 3, Section 10.

Floyd v. *C. & O. Ry. Co.*,
112 W. Va. 66, 164 S. E. 28;

Peerce v. *Kitzmiller*,
19 W. Va. 564.

ARGUMENT

The defendant strenuously objects to the order of the Circuit Court on the grounds set forth above, for it seems a palpable disregard of fundamental safeguards set up by the people themselves, from whom all governmental power is derived, to protect themselves from the inroads of tyranny.

A case much in point with the action sought to be taken here is *District of Columbia* v. *Little*, 178 F. 2d 13, 13 ALR 2d 954. In that case upon a complaint a health inspector of the District of Columbia, without first obtaining a warrant, but under authority of a health regulation (based upon Acts of Congress), demanded to search the premises of the defendant. The demand was refused, and the defendant was arrested, tried and convicted upon an information charging her with hindering, obstructing and interfering with the inspector in the performance of his duty. The following appears in the Court's language:

> "To say that a man suspected of crime has a right to protection against search of his home without a warrant, but that a man not suspected of crime has no such protection, is a fantastic absurdity.
>
> The argument involves a basic error in reasoning in respect to the Constitution's Bill of Rights. The Fourth Amendment did not confer a right upon the people. It was a precautionery statement of a lack of federal governmental power, coupled with a rigidly restricted permission to invade the existing right. The right guaranteed was a right already belonging to the people. The reason for the search warrant clause was that public interest required that personal privacy be invadable for the detection of crime, and the amendment provided the sole and only permissible process by which the right of privacy could be invaded. To view the Amendment as a limitation upon an otherwise unlimited right of search is to invert completely the true posture of rights and the limitations thereon
>
> Much of the argument of the District is devoted to establishing the public importance of the health laws. Assertions are also made of the beneficience and for-

bearance of health officers. We may assume both propositions. But the constitutional guarantee is not restricted to unimportant statues and regulations or to malevolent and arrogant agents. Even for the most important laws and even for the wisest and most benign officials a search warrant must be had. x x x Distinction between inspection and search of a home has no basis in sematics, in constitutional history, or in reason. 'Inspect' means to look at, and 'search' means to look for. To say that the people in requiring the adoption of the Fourth Amendment, meant to restrict invasion of their homes if governmental officials were looking for something, but not to restrict it if the officials were merely looking, is to ascribe to the electorate of that day and to the several legislatures and the Congress a degree of irrationality not otherwise observable in their dealings with potential tyranny."

In *Boyd* v. *United States*, 116 U. S. 616, 6 St. Ct. 524, 29 L. Ed. 746, a landmark in the law of searches and seizures, it was said:

"In order to ascertain the nature of the proceeding intended by the Fourth Amendment to the Constitution under the terms 'unreasonable searches and seizures', it is only necessary to recall the contemporary or then recent history of the controversies on the subject, both in this country and in England. The practice had obtained in the Colonies, of issuing writs of assistance to the revenue officers, empowering them, in their discretion, to search suspected places for smuggled goods, which James Otis pronounced 'the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law, that ever was found in an

English law book', since they placed 'the liberty of every man in the hands of every petty officer.'"

Counsel for defendant find it difficult to distinguish between the ancient and well detested writ of assistance and the order entered by the Circuit Court of Cabell County upon a petition entirely unsupported by a scintilla of evidence; the effect of each is the same.

There is a further objection to the ruling of the Circuit Court, in that a reading of the testimony adduced in support of the petition will show that it is devoid entirely of any proof of wrongdoing on the part of the defendant. The entry of the order complained of was therefore in contravention of Article 3, Section 10 of the Constitution of West Virginia. "Due process of law", as counsel understands it, means observance of those rules and forms which have been established in legal procedure for the protection of private rights. *Floyd* v. *C. & O. Ry. Co.*, 112 W. Va. 66, 164 S. E. 28; *Peerce* v. *Kitzmiller*, 19 W. Va. 564. It seems fundamental that such procedure requires some basis for a Court's finding, and if the record is absolutely devoid of such basis, an order depriving a citizen of liberty or property cannot stand in face of this organic provision.

It is, therefore, respectfully submitted that the order of the Circuit Court entered on the 23rd day of September, 1966 should be set aside and held for naught.

Respectfully submitted,

H. G. WILLIAMSON

J. J. N. Quinlan,
H. G. Williamson,
Attorneys for Defendant
909 Fifth Avenue
Huntington, W. Va.

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SUPREME COURT, U. S.

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October Term, 1967

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Appellant,

v.

WEST VIRGINIA BOARD OF DENTAL EXAMINERS, and EDWARD J. JOSEPH, J. J. HERLIHY, WILLIAM I. BAKER, A. BROOKS DRAKE and LAWRENCE FANTI, Members of West Virginia Board of Dental Examiners,

Appellees.

ON APPEAL FROM THE CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA

MOTION TO DISMISS APPEAL FOR LACK OF JURISDICTION

C. DONALD ROBERTSON
Attorney General
State of West Virginia
Charleston, West Virginia

THOMAS B. YOST
Assistant Attorney General
State of West Virginia
Charleston, West Virginia
Counsel for Appellees

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NO. 686

IN THE

Supreme Court of The United States

October Term, 1967

HARRY C. DEVORE,

Appellant,

v.

WEST VIRGINIA BOARD OF DENTAL EXAMINERS, and EDWARD J. JOSEPH, J. J. HERLIHY, WILLIAM I. BAKER, A. BROOKS DRAKE and LAWRENCE FANTI, Members of West Virginia Board of Dental Examiners,

Appellees.

ON APPEAL FROM THE CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA

MOTION TO DISMISS APPEAL FOR LACK OF JURISDICTION

MOTION TO DISMISS

Appellees, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, move that the jurisdictional statements of appellant be dismissed on the grounds that the federal question sought to be reviewed was not timely or properly raised in the Cir-

cuit Court of Cabell County, West Virginia, and that the State court did not expressly pass on the federal question sought to be reviewed, and that no federal question is properly presented by appellant, and that the judgment of the Circuit Court of Cabell County rests upon an adequate non-federal basis, and that appellants have not exhausted the available State remedies.

STATEMENT OF THE CASE

On October 6, 1958, the Circuit Court of Cabell County, West Virgnia, issued an injunction order against the appellant Devore enjoining him from practicing dentistry in the State of West Virginia without first obtaining a license therefor.

Based upon numerous complaints by local dentists of the City of Huntington, Cabell County, West Virginia, that Mr. Devore was in fact continuing to practice dentistry at his laboratory located outside Huntington, West Virginia, Dr. Robert M. Wild, a practicing dentist and Secretary of the West Virginia Board of Dental Examiners, went to Devore's place of business and asked to examine the premises pursuant to law. Devore refused him entry and at a later date, that is to say on or about July 18, 1966, Dr. Wild, in the company of two Assistant Attorneys General of the State of West Virginia, once against visited Devore's laboratory and sought entrance to inspect and were once again denied entry.

Thereafter, on the 16th day of September, 1966, counsel for the appellee Board petitioned and moved the Circuit Court of Cabell County for an order modi-

fying the heretofore issued injunction order to permit members of the West Virginia Board of Dental Examiners to enter upon and inspect, during normal business hours, the business premises of Devore, the appellant herein. Nothing contained in said petition or motion indicated that the hearing was to be upon contempt of the injunction. However, immediately prior to the hearing, counsel for the Board was approached by an elderly gentleman who stated that Devore had recently made him a set of false teeth. After orally making its primary motion, counsel for the Board asked leave to allow this witness to testify. During this witness's testimony it became evident that Mr. Devore did not in fact make his teeth and upon motion by Devore's counsel his testimony was stricken without objection. Thereupon the Court granted the motion to amend the injunction order as prayed for.

Nowhere in the record of these proceedings is there any showing that counsel for Devore objected to the amendment on the grounds that the same was violative of either the State or Federal Constitution. No written pleadings were filed then or later setting up said grounds nor did the court ever rule on said grounds.

Thereafter, Devore, on the last day of the statutory appeal period, applied to the Supreme Court of Appeals of the State of West Virginia for appeal and supersedeas. The application was made without oral argument and upon the petition and memorandum of authorities accompanying the same. Thereafter on the 5th day of June, 1967, that court refused the appeal without hearing or written opinion as is the practice of that court. Appeal was then taken to this honorable Court.

ARGUMENT

I:

Although appellant appealed the order of the Circuit Court of Cabell County to the West Virginia Supreme Court of Appeals, the refusal of that court to grant the appeal can in no way be construed as an affirmation of the lower court's decision. See *Chenoweth* v. *Keenan*, 61 W. Va. 108, 55 S. E. 991, wherein it was held that:

> "* * * When a writ of error is taken from a circuit court to the supreme court, and it is simply dismissed, without hearing, the circuit court judgment still stands without action by the supreme court affirming it, because it takes reversal to affect it, the writ of error resting on error in the record, and is not a new trial. * * *"

This fact is important for the reason that the record reveals that appellant did not, in fact, raise the federal issues which he now alleges confer jurisdiction on this court, at the hearing in the Circuit Court of Cabell County, from which court he now seeks appeal. The constitutional grounds asserted in appellant's jurisdictional statement were raised for the first time upon appeal to the West Virginia Supreme Court of Appeals and were not specifically ruled upon by that court. Appellant's petition to our State Supreme Court (see Appendix A) states that the action of the lower court was "arbitrary" and its order of September 23, 1966 was "unconstitutional in its application", citing in his memorandum the Fourth Amendment of the United States Constitution and Sections 10 and 6 of Article III of the West Virginia Constitution (our due process

and search and seizure provisions). It is obvious therefore that in the absence of any written opinion by the State Supreme Court, our highest court, the court's refusal to grant the appeal could have rested upon adequate non-federal grounds. See *Stembridge* v. *Georgia*, 72 S. Ct. 834, 343 U. S. 541, 96 L.Ed 1130, wherein this court held that:

> "It is apparent from the record that the Supreme Court of Georgia took no action upon the question of federal constitutional rights raised for the first time on the motion for rehearing in the Court of Appeals. This was in accord with its rule that constitutional questions must first be raised in the trial court. Beckmann v. Atlantic Ref. Co. 181 Ga 456, 182 SE 595. The attempt to raise the question of constitutional rights in the general terms of the above quotation from the petition for certiorari did not begin to meet the requirement of the Supreme Court of Georgia for definiteness. Persons v. Lea, 207 Ga 384, 61 SE 2d 832.
>
> "At this stage, the Supreme Court of Georgia could have denied certiorari on adequate state grounds. Where the highest court of the state delivers no opinion and it appears that the judgment *might* have rested upon a nonfederal ground, this Court will not take jurisdiction to review the judgment.* * *
>
> "The amending order of the Georgia Court of Appeals does not, in our view, change the posture of this case — it does not remove the strong possibility, in light of Georgia law, that the Supreme Court of Georgia might have rested its order on a nonfederal ground. We are without jurisdiction when the question of the existence

of an adequate state ground is debatable. Bachtel v. Wilson, 204 US 36, 51 L ed 357. 27 S Ct 243.

"The petition for certiorari was improvidently granted, and the case is dismissed."

It is therefore urged that the failure of appellant to properly and timely raise the federal issues in the trial court and for the further reason that the state's highest court could not have and did not in fact rule on such federal questions, removes jurisdiction from this honorable Court to consider this case.

II.

The thrust of appellant's argument to this Court is that Chapter 30, Article 4a (sic) of the Code of West Virginia is unconstitutional as being repugnant to Fourth Amendment to the United States Constitution. The statute in question is actually Chapter 30, Article 4, Section 4a, of the Code of West Virginia.

The statutes of West Virginia provide appellant with a complete and adequate means by which this question can be resolved, which remedy although available has not been utilized. We refer to Chapter 55, Article 13 of the Code of West Virginia known as the "Uniform Declaratory Judgments Act". (Appendix B) Under this statute, the constitutionality of a statute may be determined before or after breach at the petition of a properly interested party. *Farley* v. *Graney*, 146 W. Va. 22, 119 S. E. 2d 833. The availability of this remedy is doubly important inasmuch as the Circuit Court of Cabell County was never given

the opportunity to rule on the constitutional questions presented here and thus the doctrine of election of remedies is not available to the appellants herein. See *Parker* v. *Los Angeles*, 338 U. S. 327, 94 L. Ed. 144.

III.

Appellee Board has not attempted to implement the order of the Circuit Court of Cabell County, West Virginia, allowing its members to inspect appellant's premises, nor is such attempt alleged by appellant. Appellant therefore has suffered no actual injury by said order. No search has been made nor has appellant been charged with any violation of the injunction order complained of by failing to allow a search. His position is likened to one where a litigant is asking this court to rule in advance whether or not he has to obey a court order if such order is sought to be enforced in the future, and thus presents, at best, an academic question. *Alabama Fed. of Labor* v. *McAdory*, 325 U. S. 472, 89 L. ed 1725. On this ground alone, the instant case is readily distinguishable from the cases of *Camaro* v. *San Francisco*, ... U. S. ....., 18 L. ed 2d 930; and *See* v. *Seattle*, ... U. S. ....., 18 L. ed. 2d 943, cited by appellant as conferring jurisdiction on this court, since those cases involve persons either actually convicted of a crime or charged and waiting trial.

Appellant's appeal to this court is clearly premature. He has sustained no injury as a result of the lower court's decision and if appellees attempt to invoke the order at a later time, the laws and procedures of the State judicial system will afford appellant ample opportunities to properly assert in the State courts the

matters he now attempts to bring before this court. *Asbury Hospital* v. *Cass Co.*, 66 S. Ct. 61, 326 U. S. 207, 90 L. ed 6. As we have stated before, no state court has ruled on the alleged federal questions now before this court and in the absence of such a ruling this court has historically refused jurisdiction. *Adler* v. *Board of Education*, 72 S. Ct. 380, 342 U. S. 485, 96 L. ed. 517.

IV.

Appellant, in seeking review by this court, relies almost exclusively on the recent decisions of *Camaro* and *See, supra*, which were both decided by this court on the 5th day of June, 1967, which coincidentally was the same day the West Virginia Supreme Court of Appeals refused appellant's appeal thereto and thus obviously could not have had the benefit of these decisions. However, we still maintain that the purported federal questions presented to the State Supreme Court were not timely or properly made inasmuch as they were not raised at the trial court and further that the State Supreme Court's refusal to allow an appeal without a written opinion does not show that the federal questions were actually considered and passed upon and that the Court's decision could have been based upon adequate non-federal grounds. *Walters* v. *City of St. Louis*, 74 S. Ct. 505, 347 U. S. 231, 98 L. ed 660.

Even assuming that appellant has legally met the jurisdictional prerequisites of 28 USC 1257 (2), appellees contend that the cases relied on by appellant are (1) clearly distinguishable and (2) not applicable because they are not retroactive in their effect.

Essentially the *See* and *Camaro* cases are the same, the only difference being that one involved a private dwelling and the other a commercial establishment. This distinction is immaterial here since appellant could contend that his establishment meets either or both criteria in that it is a business establishment attached to his private dwelling. However, the real import of these decisions is that a warrantless search by government administrative officers, pursuant to authorizing statutes, is unconstitutional. The evil thus sought to be avoided is not a search but rather only a warrantless search. In the *Camaro* case, *supra*, this Court restated and approved the language of *Johnson* v. *United States*, 323 U. S. 10, 14, 92 L. ed 436, 68 S. Ct. 367, as follows:

> "'The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a *judicial officer*, not by a policeman or government enforcement agent.'" (Emphasis supplied.)

This philosophy was explained in more detail by this court in the *Camaro* opinion when it stated that:

> "In our opinion, these arguments unduly discount the purposes behind the warrant machinery contemplated by the Fourth Amendment. Under the present system, when the inspector demands entry, the occupant has no way of knowing whether enforcement of the municipal code involved requires inspection of his premises, no way of knowing the lawful limits of the

> inspector's power to search, and no way of knowing whether the inspector himself is acting under proper authorization. These are questions which may be reviewed by a neutral magistrate without any reassessment of the basic agency decision to canvass an area. Yet, only by refusing entry and risking a criminal conviction can the occupant at present challenge the inspector's decision to search. And even if the occupant possesses sufficient fortitude to take this risk, as appellant did here, he may never learn any more about the reason for the inspection than that the law generally allows housing inspectors to gain entry. The practical effect of this system is to leave the occupant subject to the discretion of the official in the field. This is precisely the discretion to invade private property which we have consistently circumscribed by a requirement that a disinterested party warrant the need to search. * * *"

None of these principles apply to the instant case. Here the act complained of is not an attempted warrantless search by a government administrative officer, but rather a *judicial order* permitting such search, issued by the judge of the highest court of record of the county, based upon a verified petition and motion, and after a hearing thereon. (Appendix C) Such a judicial order certainly meets and even exceeds the requirement of obtaining a warrant from a police judge, mayor or local justice of the peace, who, under West Virginia procedure, are authorized to issue the same. Further, the laws of West Virginia make no provision for obtaining a civil administrative "inspection warrant" but only a criminal search and seizure warrant. (Appendix D) At best, appellant may only complain that the lower State court issued its order on insuf-

ficient grounds or without a showing of probable cause. Neither of these grounds presents a federal question reviewable by this court. *Howat* v. *Kansas*, 42 S. Ct. 277, 258 U. S. 181, 66 L. ed. 550; *American F. Ins. Co.* v. *King Lumber, etc., Co.*, 39 S. Ct. 431, 250 U. S. 2, 63 L. ed. 810.

The order of the lower court complained of herein was entered on the 23rd day of September, 1966, and the cases primarily relied upon by appellant were not decided until June 5, 1967. The rules laid down by the cases, *Camaro* and *See*, were not made retroactive and thus cannot form the basis for overthrowing an act which took place prior thereto. Of course, as we stated earlier, no search has yet been attempted under the court order complained of and thus neither the appellant nor this court could surmise or predict what action the State trial court would take if contempt proceedings were brought against appellant for failure to allow a search, and the constitutional issues herein presented by appellant were properly laid before such State trial court.

CONCLUSION

For the reasons hereinabove cited, it is respectfully urged that the appeal should be dismissed.

Respectfully submitted,

C. DONALD ROBERTSON
Attorney General

THOMAS B. YOST
Assistant Attorney General

Counsel for Appellees

APPENDIX A

IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

WEST VIRGINIA BOARD
OF DENTAL EXAMINERS,
and
EDWARD J. JOSEPH,
J. J. HERLIHY,
WILLIAM I. BAKER,
A. BROOKS DRAKE,
and LAWRENCE FANTI,
Members of the West Virginia
Board of Dental Examiners,
Plaintiffs

VS : : : IN CHANCERY NO. 740

HARRY C. DEVORE,
Defendant

PETITION

TO THE HONORABLES, THE JUDGES OF THE SUPREME COURT OF APPEALS:

Your petitioner, Harry C. Devore, would respectfully represent unto this Honorable Court that he is aggrieved by a final order made and entered on the 23rd day of September, 1966, by the Circuit Court of Cabell County, West Virginia.

Such portion of the original record as will adequately present the errors complained of, properly

certified, is herewith presented and therefrom it will appear that the case is as follows:

Action and Proceedings

On August 4, 1958, the plaintiffs, West Virginia Board of Dental Examiners and the predecessor members of said board filed their amended and supplemental bill of complaint in the Circuit Court of Cabell County, West Virginia, after a previous bill of complaint had been held insufficient on demurrer by said Court, wherein, after recitation of jurisdictional facts and powers and duties of the plaintiffs, together with allegations of purported misconduct of the defendant under certain acts of the West Virginia Legislature therein cited, plaintiffs prayed for a temporary and permanent injunction enjoining, restraining and inhibiting your petitioner "from doing any acts constituting the practice of dentistry or of dental hygiene within the State of West Virginia without prior licensing by the West Virginia Board of Dental Examiners xxxxx". After hearing upon a companion case, which the parties, by counsel, agreed would control the present case the Circuit Court of Cabell County on the 6th day of October, 1958, caused to be entered an order perpetually enjoining your petitioner "from doing any act or acts, directly or indirectly, within the State of West Virginia constituting the practice of dentistry or the practice of dental hygiene as defined by statute without having first been licensed thereto by the West Virginia Board of Dental Examiners or a successor body."

On the 4th day of August, 1966, the successor board and its constituent members caused to be filed in the

Circuit Court of Cabell County, West Virginia, their petition alleging that the defendant refused entry and inspection of defendant's premises by a member of the dental board under Code, 30-4-4a which was amended by the Legislature by Chapter 108 of its Acts which added the following language:

> "The board, acting by and through its members, employees, and agents, is further authorized and empowered, at any time during customary office hours, to enter into the office or place of business of any dental laboratory, licensed dentist or other dental practitioner of this state, and to obtain access to, make inspection of, and request information regarding any work authorization which such dental laboratory, licensed dentist, or other dental practitioner is required under the provisions of section two-a of this article, to retain therein, and is further authorized and empowered to inspect any items of dental technological work then in the course of performance by such dental laboratory or person employed by it, and to inspect any dental prosthesis then in the place of business of, or upon the premises occupied by, such dental laboratory for making, production, reproduction, construction, repair, alteration, or restoration, and to request any information which it, its members, employees, or agents deem to be pertinent relating to any such dental technological work and any such dental prosthesis. For the purpose of this paragraph the definition of terms contained in subsection A of section two-a of this article is made expressly applicable."

The petition further alleged certain matters upon which no evidence was adduced or sought to be adduced, but on the contrary the Court permitted certain other

evidence to be introduced, at the conclusion of which the Court sustained defendant's counsel's motion to strike. However, in spite of the fact that no evidence whatsoever was introduced to show a violation of the injunction, the Court permitted an amendment to the 1958 order permitting inspection of your petitioner's premises in the language of the statute above quoted. It is of this arbitrary action of the lower court that your petitioner complains.

Errors Assigned

The Court erred in entering the final order complained of, dated the 23rd day of September, 1966, as being unconstitutional in its application.

WHEREFORE, your petitioner prays that he be awarded an appeal and supersedeas herein, and that this Court do review and reverse the final order of the Circuit Court of Cabell County and hold the same for naught.

Respectfully submitted,

/s/ H. G. Williamson,
J. J. N. Quinlan,
H. G. Williamson,
Attorneys for defendant
909 Fifth Avenue
Huntington, W. Va.

Certificate of Counsel

I, H. G. WILLIAMSON, an attorney practicing before this Honorable Court, do certify that, in my opinion, the action taken by the court below is prejudicially erroneous and that such action should be reviewed and reversed.

H. G. Williamson

APPENDIX B

ARTICLE 13.

UNIFORM DECLARATORY JUDGMENTS ACT.

Sec.

55-13-1. Power of courts to declare rights, status and other legal relations; objections; form and effect of declaration.

55-13-2. Who may have determination and obtain declaration.

55-13-3. Construction of contract before or after breach.

55-13-4. Declaration concerning trusts and estates.

55-13-5. No restriction on powers conferred by § 55-13-1.

55-13-6. When court may refuse judgment.

55-13-7. Review.

55-13-8. Further relief.

55-13-9. Trial and determination of issues of fact.

55-13-10. Costs.

55-13-11. Parties.

55-13-12. Article remedial; liberal construction and administration thereof.

55-13-13. "Person" defined.

55-13-14. Severability.

55-13-15. Interpretation and construction of article.

55-13-16. Citation of article.

§ 55-13-1. Power of courts to declare rights, status and other legal relations; objections; form and effect of declaration.

Courts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree.

§ 55-13-2. Who may have determination and obtain declaration.

Any person interested under a deed, will, written contract, or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.

§ 55-13-3. Construction of Contract before or after breach.

A contract may be construed either before or after there has been a breach thereof.

§ 55-13-4. Declaration concerning trust and estates.

Any person interested as or through an executor, administrator, trustee, guardian or other fiduciary,

creditor, devisee, legatee, heir, next of kin or cestui que trust, in the administration of a trust, or of the estate of a decedent, an infant, lunatic or insolvent, may have a declaration of rights or legal relations in respect thereto:

(a) To ascertain any class of creditors, devisees, legatees, heirs, next of kin or others; or

(b) To direct the executors, administrators, or trustees to do or abstain from doing any particular act in their fiduciary capacity; or

(c) To determine any question arising in the administration of the estate or trust, including questions of construction of wills and other writings.

§ 55-13-5. No restriction on powers conferred by § 55-13-1.

The enumeration in sections two, three, and four [§§ 55-13-2, 55-13-3 and 55-13-4] does not limit or restrict the exercise of the general powers conferred in section one [§ 55-13-1], in any proceeding where declaratory relief is sought, in which a judgment or decree will terminate the controversy or remove an uncertainty.

§ 55-13-6. When court may refuse judgment.

The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding.

§ 55-13-7. Review.

All orders, judgments and decrees under this article may be reviewed as other orders, judgments and decrees.

§ 55-13-8. Further relief.

Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application therefor shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party whose rights have been adjudicated by the declaratory judgment or decree, to show cause why further relief should not be granted forthwith.

§ 55-13-9. Trial and determination of issues of fact.

When a proceeding under this article involves the determination of an issue of fact, such issue may be tried and determined in the same manner as issues of fact are tried and determined in other civil actions in the court in which the proceeding is pending.

§ 55-13-10. Costs.

In any proceeding under this article the court may make such award of costs as may seem equitable and just.

§ 55-13-11. Parties.

When declaratory relief is sought, all persons shall be made parties who have or claim any interest which

would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding. In any proceeding which involves the validity of a municipal ordinance or franchise, such municipality shall be made a party, and shall be entitled to be heard, and if the statute, ordinance or franchise is alleged to be unconstitutional, the attorney general of the State shall also be served with a copy of the proceeding and be entitled to be heard.

§ 55-13-12. Article remedial; liberal construction and administration thereof.

This article is declared to be remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations; and is to be liberally construed and administered.

§ 55-13-13. "Person" defined.

The word "person," wherever used in this article, shall be construed to mean any person, partnership, joint-stock company, unincorporated association or society, or municipal or other corporation of any character whatsoever.

§ 55-13-14. Severability.

The several sections and provisions of this article, except sections one and two [§§ 55-13-1 and 55-13-2], are hereby declared independent and severable, and the invalidity, if any, of any part or feature thereof shall not affect or render the remainder of the article invalid or inoperative.

§ 55-13-15. Interpretation and construction of article.

This article shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of the states which enact it, and to harmonize, as far as possible, with federal laws and regulations on the subject of declaratory judgments and decrees.

§ 55-13-16. Citation of article.

This article may be cited as the "Uniform Declaratory Judgments Act."

APPENDIX C

IN THE CIRCUIT COURT OF CABELL COUNTY,
WEST VIRGINIA

WEST VIRGINIA BOARD OF DENTAL EXAMINERS and EDWARD J. JOSEPH, J. J. HERLIHY, WILLIAM I. BAKER, A. BROOKS DRAKE and LAWRENCE FANTI, MEMBERS OF WEST VIRGINIA BOARD OF DENTAL EXAMINERS,

Plaintiffs,

vs. IN CHANCERY

HARRY C. DEVORE,

Defendant.

PETITION AND MOTION ON BEHALF OF PLAINTIFFS

WHEREAS, by order dated the 6th day of October, 1958, this Court perpetually enjoined the defendant herein, Harry C. Devore, from doing any act or acts, directly or indirectly, within the State of West Virginia constituting the practice of dentistry or dental hygiene as defined by statute without first having been licensed therefor by the West Virginia Board of Dental Examiners, and

WHEREAS, said defendant, Harry C. Devore, since the issuance of said order has not obtained a license to practice either dentistry or dental hygiene in this State, and

WHEREAS, the plaintiffs herein, upon information and knowledge and verily believing that said Harry C. Devore was operating a dental laboratory and otherwise engaging in the practice of dentistry, did through a duly appointed member of the West Virginia Board of Dental Examiners, to-wit: Dr. Robert M. Wild of Huntington, West Virginia, on the ____ day of July, 1966, attempt to inspect the offices of said Harry C. Devore, located at or near Ona, in Cabell County, West Virginia, pursuant to the authority of Chapter 30, Article 4, Section 4a, of the Code of West Virginia, which provides, in part, that:

> "The board, acting by and through its members, employees, and agents, is further authorized and empowered, at any time during customary office hours, to enter into the office or place of business of any dental laboratory, licensed dentist or other dental practitioner of this state, and to obtain access to, make inspection of, and request information regarding any work authorization which such dental laboratory, licensed dentist, or other dental practitioner is required under the provisions of section two-a of this article, to retain therein, and is further authorized and empowered to inspect any items of dental technological work then in the course of performance by such dental laboratory or person employed by it, and to inspect any dental prosthesis then in the place of business of, or upon the premises occupied by, such dental laboratory for making, production, reproduction, construction, repair, alteration, or restoration, and to request any information which it, its members, employees, or agents deem to be pertinent relating to any such dental technological work and any such dental prosthesis. For the purpose of this paragraph the

definition of terms contained in subsection A of section two-a of this article is made expressly applicable."

and that said Harry C. Devore did wrongfully and illegally refuse to permit said inspection of his premises as authorized by law, and

WHEREAS, Eugene W. Miller, an employee of the West Virginia State Tax Commissioner, pursuant to his duties, did enter upon the premises of said Harry C. Devore, located at or near Ona, Cabell County, West Virginia, and said Harry C. Devore did freely and voluntarily divulge unto said Eugene W. Miller, information and facts which clearly show that said Harry C. Devore is violating the provisions of said injunction order, but that said Eugene W. Miller is by statute precluded from divulging said information except under judicial order.

WHEREFORE, the petitioners herein do hereby petition and move the Court as follows:

1. To issue an order directing the defendant herein, Harry C. Devore, to allow any person as hereinabove authorized to inspect his premises and place of business herein described.

2. To modify the injunction order heretofore issued by this Court by adding thereto the following:

> "*It is further adjudged, ordered and decreed* that the defendant Harry C. Devore, shall at all reasonable times allow the West Virginia Board of dental Examiners, acting by and through its members, employees or agents, or any officer or person duly appointed by this

Court to enter upon and inspect any premises owned or operated by said Harry C. Devore, to the end that the Court shall be assured that its order is being complied with and in all other respects obeyed."

3. To issue a subpoena directed to said Eugene W. Miller compelling him to present himself to this Court at such time and place as the Court shall deem proper, to testify as to matters within his personal knowledge concerning the conduct of said Harry C. Devore.

WEST VIRGINIA BOARD OF DENTAL EXAMINERS, et al.
By Counsel

THOMAS B. YOST
Assistant Attorney General

STATE OF WEST VIRGINIA,
COUNTY OF KANAWHA, to-wit:

Thomas B. Yost, a credible person, being duly sworn, says that he has read the foregoing petition and motion and that he knows the contents thereof, that the facts and allegations therein contained are true, except such as are therein stated upon information and belief, and that as to such allegations, he believes them to be true.

Thomas B. Yost

Taken, sworn to and subscribed before me this _____ day of July, 1966, in my said County.

Notary Public in and for Kanawha County, West Virginia

My commission expires _____.

APPENDIX D

§ 62-1A-1. Search warrant—Who may issue.

A search warrant authorized by this article may be issued by a judge of a court having jurisdiction to try criminal cases in the county, or by a justice of the county, or by the mayor or judge of the police court of the municipality, wherein the property sought is located.

§ 62-1A-2. Same—Grounds for issuance; property defined.

A warrant may be issued under this article to search for and seize any property

(a) Stolen, embezzled or obtained by false pretenses; or

(b) Designed or intended for use or which is or has been used as a means of committing a criminal offense; or

(c) Manufactured, sold, kept, concealed, possessed, controlled, or designed or intended for use or which is or has been used, in violation of the criminal laws of this State heretofore or hereinafter enacted.

The term "property" shall include documents, books and papers and any other tangible objects.

§ 62-1A-3. Same—Issuance and contents.

A warrant shall issue only upon complaint on oath or affirmation supported by affidavit sworn to or affirmed before the judge or magistrate setting forth the facts establishing the grounds for issuing the warrant.

If the judge or magistrate is satisfied that there is probable cause to believe that grounds therefor exist, he shall issue a warrant identifying the property and particularly describing the place, or naming or particularly describing the person, to be searched. The warrant shall be directed to the sheriff or any deputy sheriff or constable of the county, to any member of the department of public safety or to any police officer of the municipality wherein the property sought is located, or to any other officer authorized by law to execute search warrants. It shall state the grounds or probable cause for its issuance and the names of the persons whose affidavits have been taken in support thereof: It shall command the officer to search forthwith the person or place named for the property specified, to seize such property and bring the same before the judge or magistrate issuing the warrant. Such warrant may be executed either in the day or night.

§ 62-1A-4. Same—Execution and return with inventory.

The warrant may be executed and returned only within ten days after its date. The officer taking property under the warrant shall give to the person from whom or from whose premises the property is taken a copy of the warrant and a receipt for the property taken; or if the person from whose premises the property is taken is not present at the time, the officer shall leave the copy and receipt at the place from which the property is taken. The return shall be made promptly and shall be accompanied by a written inventory of any property taken. The judge or magistrate shall upon request deliver a copy of the inventory to the person

from whom or from whose premises the property was taken.

§ 62-1A-5. Breaking and entering premises.

The officer may break into a house, building or structure, or any part thereof, or anything therein, or any vehicle, vessel or other conveyance, to execute a search warrant, or commit such breaking as may be necessary to liberate himself or a person aiding him in the execution of the warrant. If the place to be searched is a dwelling he shall not attempt a forcible entry until he shall have given notice of his authority and purpose and shall have been refused admittance.

§ 62-1A-6. Motion for return of property and to suppress evidence.

A person aggrieved by an unlawful search and seizure may move for the return of the property and to suppress for use as evidence anything so seized on the ground that (1) the property was illegally seized without a warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. If the offense giving rise to the issuance of the warrant be one which a magistrate has jurisdiction to hear and determine, the motion may be made to him. If the offense is cognizable only before a court of record the motion shall be made to the court having jurisdiction. The judge or magistrate shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property

shall be returned unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion may be made before trial or hearing upon three days' notice, or, the motion may be made or renewed at the trial or hearing.

§ 62-1A-7. Disposition of seized property.

Property taken pursuant to the warrant shall be preserved as directed by the court or magistrate for use as evidence and thereafter shall be returned, destroyed or otherwise disposed of as the court or magistrate may direct.

§ 62-1A-8. Purpose of article; construction of other provisions dealing with search warrants; repeal of inconsistent laws.

It is intended that this article govern the issuance and execution of all search warrants, and no subsequent legislation shall be held to supersede or modify the provisions of this article except to the extent that such legislation shall do so specifically and expressly. It is recognized that throughout this Code there are many provisions dealing with the issuance and execution of search warrants, and it is not possible at this time to amend and reenact or to specifically repeal those provisions. Accordingly, all such provisions shall be construed so as to conform to and be consistent with the pertinent provisions of this article. In the event that there are provisions in this Code so inconsistent with the provisions of this article as to preclude such construction, such other provisions are hereby repealed to the extent of such inconsistency.

§ 62-1A-9. Severability.

If any provision of this article or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the article which can be given effect without the invalid provision or its application, and to this end, the provisions of this article are declared to be severable.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

DEVORE *v.* WEST VIRGINIA BOARD OF DENTAL EXAMINERS ET AL.

APPEAL FROM THE SUPREME COURT OF APPEALS OF WEST VIRGINIA.

No. 686. Decided December 11, 1967.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

MR. JUSTICE DOUGLAS is of the opinion that probable jurisdiction should be noted.